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No. 99-1416

In the Supreme Court of the United States

DALE A. BROWN, R. SCOTT SATTERWHITE, AND ANTHONY P. HODGSON, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed petitioners' claims brought pursuant to the Federal Tort Claims Act and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on the ground that the claims were time-barred.

2. Whether the court of appeals properly applied Texas' two-year statute of limitations applicable to personal injury claims to petitioners' claims brought pursuant to *Bivens*.

3. Whether the court of appeals correctly dismissed petitioners' claims against respondent federal agents on the ground that respondents were entitled to qualified immunity, without affording petitioners discovery on that issue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 188 F.3d 579. The opinion of the district court (Pet. App. 25-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1999. A petition for rehearing was denied on November 12, 1999 (Pet. App. 37-38). On February 10, 2000, the time to file a petition for a writ of certiorari was extended to February 24, 2000. The petition for a writ of certiorari was filed on February 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the fall of 1991, the Federal Bureau of Investigation (FBI) initiated an undercover investigation, code-named "Operation Lightning Strike," designed to uncover procurement-related fraud and other illegal activity committed by National Aeronautic and Space Administration (NASA) employees and aerospace contractors doing business with NASA. Pet. App. 48. NASA's Office of the Inspector General and the Defense Contractor Investigative Service (DCIS) also participated in the investigation. *Id.* at 49.

a. In May 1992, FBI Special Agent James H. Francis, posing as an investor named "John Clifford," contacted petitioners Brown, Satterwhite, and Hodgson. Pet. App. 50. Petitioners were not targets of the investigation. *Ibid.* However, petitioners operated two companies that provided aerospace-related products and services to private and governmental entities, *id.* at 48, and petitioners were used by the FBI to meet potential targets within the NASA community, *id.* at 50.

Francis claimed to be a wealthy businessman seeking to market "cutting-edge" electronics to NASA and the aerospace industry. Pet. App. 49-50. He told petitioners that he planned to develop a miniature medical device—a "lithotripter"—that could help astronauts survive in space. *Id.* at 50, 53. Francis proposed that petitioners' Houston, Texas, aerospace firm form a partnership with Eastern Tech Manufacturing Corporation (ETMC), in order to gain valuable contracts with NASA and its contractors. *Id.* at 50. Francis posed as vice-president of ETMC, which was a legitimate company. *Id.* at 54. Francis also offered Brown a high-level executive position at "Space,

Inc," a front company created by the FBI, and promised to commit venture capital to petitioners' companies. *Id.* at 50-51. Petitioners agreed that it would be profitable to establish a business relationship with Francis. *Id.* at 51.

In May and July 1992, petitioners contacted various banks and companies in order to verify Francis' financial information. Pet. App. 51-53. Representatives of those institutions, cooperating with the FBI, provided petitioners with favorable, false information regarding the financial status of the fictitious "John Clifford." *Ibid.* In addition, representatives of ETMC falsely represented the company as a facility capable of and involved in the manufacture of lithotripters, and a device called a Printed Wiring Assembly Robotic Tinning System (PWARTS). *Id.* at 54, 56. Petitioners understood that the PWARTS was a possible basis for a procurement contract with the Tobyhanna United States Army base. *Id.* at 56. In reliance on these misrepresentations, petitioners met with personnel from NASA, as well as companies within the aerospace community and the private industry, and submitted proposals to those entities representing that ETMC and Space, Inc., as well as petitioners' own companies, could develop products and services meeting NASA's standards. *Ibid.*

From December 1992 to March 1993, Francis sought to persuade Brown to abandon his career plans in the commercial space industry. Pet. App. 58. He offered Brown a job as a construction supervisor, responsible for the building of a Bahamas hotel, with a large salary and attractive fringe benefits, including a private plane. *Ibid.* In anticipation of this new position, Brown dissolved his business relationship with petitioners Hodgson and Satterwhite. *Id.* at 59.

On February 26, 1993, Francis instructed Brown's business associate, Neal Jackson, to "entertain," with Brown's assistance, a procurement official from the Army's Tobyhanna base who would be visiting Houston. Pet. App. 59. On March 4, 1993, Francis told Jackson that the official did not wish to be entertained, but requested that "entertainment funds" be brought to his hotel. *Ibid.* Brown and Jackson drove to the official's hotel in Houston, where Jackson handed Brown a sealed envelope, and told Brown to deliver it to the official's room. Brown did so, and immediately departed. *Id.* at 59-60. Audio and visual recording equipment had been installed in the hotel rooms by the FBI. *Id.* at 60.

b. On August 4, 1993, FBI agents confronted Brown in a warehouse in Houston, Pet. App. 60, where they informed him of the existence of the undercover investigation, that Clifford was an FBI agent, and that the projects and job offers Clifford had described did not actually exist. Pet. 8. According to the Complaint, the agents intimidated, psychologically abused, and blackmailed Brown, in order to coerce him into "going undercover and setting up other stings on other aerospace contractors." Pet. App. 60. The agents, *inter alia*, threatened to prosecute Brown for various crimes. *Ibid.* Brown agreed to cooperate.[1]

On May 22, 1994, Francis disclosed publicly that the FBI had been directed to abandon the undercover investigation. Pet. App. 62. On August 24, 1994, a

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[1] The Complaint alleges that as part of his cooperation, Brown was forced to settle a pending lawsuit against a company that he agreed to investigate, and then was coerced to sign a waiver stating that the FBI had not pressured him to settle. Pet. App. 61-62.

federal grand jury indicted Brown for one count of offering a $500 bribe to a public official. *Ibid.* Brown's trial ended in a mistrial, and the United States Attorney declined to retry him. *Id.* at 62-63.

2. On February 22, 1996, petitioners sued the United States, and the federal agents who participated in the undercover investigation, in their individual capacities, in the United States District Court for the Southern District of Texas.[2] Pet. App. 2. Petitioners brought claims against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) (1994 & Supp. IV 1998), 2401(b), 2671-2680, alleging false imprisonment, abuse of process, malicious prosecution, assault, intentional infliction of emotional distress, and invasion of privacy. Pet. App. 32. Petitioners also brought claims against the federal agents alleging, *inter alia*, violations of their due process and Fifth Amendment rights pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*[3] Pet. App. 28, 34.

On July 30, 1997, the district court dismissed petitioners' claims against the United States alleging malicious prosecution and abuse of process, brought pursuant to the FTCA, on the ground that the claims were barred by the FTCA's "discretionary function"

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[2] Petitioners also sued the private businesses who assisted in the investigation. Pet. App. 2. The district court dismissed the claims against those parties and the court of appeals affirmed. *Id.* at 12, 16-18. Those determinations are not at issue here.

[3] Petitioners also brought a number of state tort law claims against respondents. Pet. App. 15. The district court dismissed those claims; the court of appeals affirmed, *id.* at 30-32, 15-16, and that determination is not at issue here.

exception. Pet. App. 34; 28 U.S.C. 2680(a). The district court dismissed petitioners' other claims brought pursuant to the FTCA, as well as petitioners' *Bivens* claims against the individual FBI agents, on the ground that the claims were time-barred. Pet. App. 32-34. The district court also dismissed petitioners' RICO claims against the agents on the ground that the agents were protected by qualified immunity. *Id.* at 29, 31.

3. Petitioners appealed, and the court of appeals affirmed. Pet. App. 1-24. The court of appeals affirmed the dismissal of petitioners' allegations of malicious prosecution and abuse of process, not on discretionary function grounds, but on the ground that petitioners failed to state a claim upon which relief could be granted. *Id.* at 10-12. The court affirmed the dismissal of petitioners' other claims against the United States brought pursuant to the FTCA alleging assault, false imprisonment, intentional infliction of emotional distress, and invasion of privacy, on the ground that the claims were time-barred. The claims involved events that took place in August and September 1993 and had not been presented to the appropriate administrative agencies within two years of their occurrence, as required by 28 U.S.C. 2401(b). Pet. App. 18-19.

The court of appeals affirmed the dismissal as time-barred of two of petitioners' claims against the respondent federal agents pursuant to *Bivens*. The court of appeals applied the two-year statute of limitations applicable to personal injury claims under Texas law, and concluded that Brown's and Satterwhite's claims accrued in August 1993, when they learned of the government's sting operation, and therefore their claims were barred by the statute of limitations. Pet. App. 19. The court could not ascertain from the record when petitioner Hodgson's *Bivens* claims

accrued, but affirmed the dismissal of his claims on the alternative ground that he did not allege a violation of "clearly established" constitutional rights and thus respondent federal agents were entitled to qualified immunity from suit. *Id.* at 20, 24. The court of appeals affirmed the dismissal of petitioners' RICO claims on the ground that petitioners failed to assert a violation of "clearly established" statutory rights, and therefore respondent federal agents were entitled to qualified immunity from suit. *Id.* at 14-15. The court of appeals subsequently denied a petition for rehearing. *Id.* at 37-38.

ARGUMENT

The court of appeals' decision to affirm the dismissal of petitioners' claims was correct and does not conflict with any decision of this Court or any other circuit. Petitioners contend that the court of appeals erroneously decided when their Federal Tort Claims Act and *Bivens* claims accrued; that the court should have applied a longer limitations period to their *Bivens* claims; and that the court should have afforded them discovery before holding that respondents were entitled to qualified immunity from suit. Petitioners' claims are without merit, and do not warrant this Court's review.

1. Petitioners contend that the court of appeals erred in deciding that their claims brought pursuant to the Federal Tort Claims Act, as well as their claims that respondent federal agents violated their Fifth Amendment rights, brought pursuant to *Bivens*, accrued in August and September 1993, when the events which form the basis of petitioners' allegations occurred. Pet. 21; Pet. App. 18-20. Contrary to petitioners' contention, the court of appeals correctly

applied settled principles of law governing the accrual of federal claims, and that decision does not warrant review.

a. Prior to bringing an action in district court pursuant to the Federal Tort Claims Act, a prospective plaintiff must present his claim in writing to the appropriate federal agency. See 28 U.S.C. 2675(a). If a claim is not presented within two years after it accrues, it is barred. See 28 U.S.C. 2401(b). A tort claim "accrues" within the meaning of Section 2401(b) when the plaintiff is aware both of the existence of the injury and its cause, that is, the connection between the injury and the defendant's action. See *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979). The same accrual analysis applies to claims brought pursuant to *Bivens*, which, as we explain below, have a two-year statute of limitations. See *Moore* v. *McDonald*, 30 F.3d 616, 620-621 (5th Cir. 1994); *Piotrowski* v. *City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

The court of appeals correctly applied these accrual principles to petitioners' claims. Petitioners presented their claims brought pursuant to the Federal Tort Claims Act to the FBI, NASA, and DCIS on January 8 and 10, 1996. Pet. App. 19, 46. They filed suit alleging violations of constitutional rights pursuant to *Bivens* on February 22, 1996. *Id.* at 7. Petitioners do not dispute that their Complaint "unmistakabl[y]" reflects that Brown, Satterwhite, and Hodgson suffered injuries more than two years prior to presenting their FTCA claims in writing, Pet. 23; see also Pet. App. 61-62, and thus, also more than two years before bringing claims under *Bivens*. Applying the FTCA rules on claim presentation and the two-year statute of limitations applicable to *Bivens* claims, the court of appeals cor-

rectly determined that petitioners' claims were time-barred. Pet. App. 18-20.

b. Petitioners contend, however, that their Complaint did not state that they knew "the identity of the specific agents involved in this matter more than two years before they presented their claim in writing." Pet. 23. They therefore take the position that the district court and the court of appeals erred in determining that their claims accrued at that time. *Ibid.*

Contrary to petitioners' argument, a claim accrues when a party has knowledge of the fact of injury and its cause, not when a party is aware of the identity of the specific agents involved. See, *e.g.*, *Gibson* v. *United States*, 781 F.2d 1334, 1344 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987). In any event, petitioners may not have known the names of the individuals who allegedly harmed them, but they concede that they were aware of their identities as law enforcement officials more than two years prior to presenting their claim in writing, and more than two years prior to bringing suit under *Bivens*. Pet. 8, 23. The court of appeals therefore correctly dismissed petitioners' claims as time-barred.[4]

2. a. Petitioners also contend that the court of appeals erred in applying a two-year statute of limitations to their *Bivens* claims. Contrary to petitioners' contention, the court of appeals correctly concluded that petitioners' *Bivens* claims are governed by Texas' two-year personal injury statute of limitations. See Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon

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[4] Petitioners state that the general public was not aware of the investigation until February 1994, Pet. 23, but petitioners do not claim that they were unaware of the agents' true identities once the investigation was revealed to them, nor that the agents concealed their identities after that point.

1986 & Supp. 2000). Courts of appeals that have addressed the issue generally agree that for the purposes of determining the applicable statute of limitations, the same rule applies to claims against federal officials brought pursuant to *Bivens* as applies to claims against state officials brought pursuant to Section 1 of the Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, currently codified at 42 U.S.C. 1983 (1994 & Supp. III 1997). Pet. 14. This Court has held that the limitations period for claims brought pursuant to Section 1983 is determined by reference to the statute of limitations applicable to personal injury claims in the relevant State. See *Wilson* v. *Garcia*, 471 U.S. 261, 280 (1985), see also *Owens* v. *Okure*, 488 U.S. 235, 249-250 (1989); Pet. 14. Accordingly, the court of appeals correctly determined that Texas' two-year limitations period applicable to personal injury claims applied to petitioners' claims brought pursuant to *Bivens*.

b. Petitioners contend that a different statute of limitations should apply to their *Bivens* claims because the constitutional wrongs they allege sound in the nature of "fraud," rather than personal injury. Pet. 14-15.[5] Petitioners therefore argue that the court of appeals should have applied Texas' four-year fraud statute of limitations to their *Bivens* claims. See Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(4) (Vernon Supp. 2000); Pet. 15.

Petitioners' claim lacks merit. This Court recognized in *Wilson* v. *Garcia* that almost every Section 1983 claim can be analogized to one of the many common law forms of action, or to a claim arising under statute.

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[5] Although petitioners attempt to distinguish their claim from a typical *Bivens* or Section 1983 claim, they recognize that the circumstances of this case are "hardly unique." Pet. 16.

Wilson, 471 U.S. at 272-273. If the statute of limitations applicable to Section 1983 claims turned on the particular facts of each claim, "uncertainty and time-consuming litigation" would inevitably result. *Id.* at 272. Therefore, this Court determined that one statute of limitations should apply to all Section 1983 claims. Because those claims are most appropriately characterized as personal injury claims, the relevant state statute of limitations applicable to personal injury actions should apply. *Id.* at 275, 278, see also *Owens*, 488 U.S. at 249-250. Petitioners do not dispute that claims brought pursuant to *Bivens* should be treated the same as claims brought pursuant to Section 1983 for statute of limitations purposes. The court of appeals' application of Texas' limitations period for personal injury claims to petitioners' claims brought pursuant to *Bivens* is therefore consistent with *Wilson* and *Owens* and does not warrant review by this Court.

3. Petitioners also contend that the court of appeals erred in holding that respondent federal agents were entitled to qualified immunity from suit and in dismissing their *Bivens* claims on that ground, without allowing petitioners discovery on that issue. Pet. App. 16-20. Because on this record the court of appeals' resolution of the immunity issue was fully consistent with this Court's immunity jurisprudence, no further review is warranted.

a. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). This rule provides officials with immunity from suit, rather than a mere defense to liability. *Mitchell* v. *Forsyth*, 472

U.S. 511, 526 (1985). For that reason, a defendant pleading qualified immunity is entitled to dismissal before discovery commences, unless "the plaintiff's allegations state a claim of violation of clearly established law." *Ibid.*; *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (qualified immunity allows government officials to avoid not only trial but pretrial burdens such as discovery). The court of appeals correctly concluded that petitioners' complaint should be dismissed on the basis of respondents' qualified immunity, because the complaint failed to allege a violation of any clearly established constitutional right. Pet. App. 20-24. Discovery has no bearing on the complaint's sufficiency in this respect.

b. Petitioners suggest that *Wilson* v. *Layne*, 526 U.S. 603 (1999), and *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), require that the court of appeals allow them discovery as to (1) whether the conduct at issue was commonplace, or an isolated incident; (2) whether the FBI maintained policies that authorized or prohibited the conduct at issue; and (3) the specific information that each federal agent possessed, regarding whether they knew their conduct was inappropriate. Pet. 18-19. Contrary to petitioners' suggestion, the court of appeals properly resolved the immunity issue without allowing petitioners discovery.

When plaintiffs' allegations fail to state a claim of clearly established law, defendants pleading qualified immunity are entitled to dismissal before the commencement of discovery. See *Mitchell*, 472 U.S. at 526; see also *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987). *Crawford-El* is not to the contrary. See *Crawford-El*, 523 U.S. at 598 (stating that if the defendant pleads the immunity defense, "the district court should resolve that threshold question before permitt-

ing discovery."). *Wilson*, on which petitioners also rely, simply recognized that whether official action is unique or commonplace, and whether an agency policy authorizes that action, may bear on the question whether the conduct at issue was reasonable, in "light of clearly established law." *Wilson*, 526 U.S. at 615; *Mitchell*, 471 U.S. at 534. The frequency of official action, and the existence of an agency policy are not relevant here, where petitioners agree that this case is the first to address the parameters of due process protection afforded innocent third parties in the context of undercover investigations, and thus that the relevant law was not clearly established at the time the conduct occurred. Pet. 18.[6] Moreover, *Wilson* does not suggest that petitioners are entitled to discovery on those issues. In any event, even if discovery revealed that respondents were acting in violation of agency policy, or that their actions were not commonplace, they would not thereby lose their qualified immunity. See *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984) (officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates an administrative provision).[7] The court of appeals ap-

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[6] The third factor proposed by petitioners suggests that the immunity analysis rests in part on each individual agent's subjective belief as to the lawfulness of his or her actions. *Harlow* and its progeny establish that the agents' subjective belief is irrelevant. See *Anderson*, 483 U.S. at 641.

[7] Petitioners also claim that the district court and court of appeals erred in dismissing their RICO claims on grounds of qualified immunity without affording them discovery. Pet. 20. Petitioners do not explain why this is so, or how discovery bears on whether their rights under RICO were "clearly established." In any event, the court of appeals correctly determined that petitioners failed to allege a violation of clearly established

propriately determined that respondents were entitled to qualified immunity because petitioners allege violations of rights that were not "clearly established" at the time the conduct at issue occurred. That decision is correct, and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

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statutory rights and therefore that respondents were entitled to qualified immunity, and that determination does not warrant review. Pet. App. 12-14.